TWO THEORIES OF CONSIDERATION.

II. Bilateral Contracts.

SINCE a promise is an act, one who defines consideration as any act of forbearance given in exchange for a promise, will necessarily find a consideration in every case of mutual promises. This, it is submitted, is the correct view upon principal.[1] In point of authority no difficulty is presented except in two classes of cases. First, those in which one of the parties promises to perform a pre-existing contractual duty to a third person. Secondly, those in which one of the parties promises to perform a pre-existing contractual duty to the counter-promisor. It will be convenient to deal with these two classes of cases separately.

I. Promises of performance of a pre-existing contractual duty to a third person.

There is believed to be no reported case in which a promise to perform a contract with A has been adjudged insufficient to support a promise by B. In a few American cases in which the plaintiff failed to recover upon a unilateral promise given in consideration of the performance of the plaintiff's contract with another, there are *dicta* placing the agreement to do and the doing of what one is already bound to do upon the same footing.[2] On the other hand in Shadwell *v.* Shadwell[3] and Scotson *v.* Pegg,[4] in which the de-

[1] Public policy may forbid the enforcement of a bilateral contract as it frequently precludes recovery upon unilateral contracts. A promise, for instance, in consideration of a counter-promise to commit a crime, or a tort, will not give a cause of action. The same is true of a promise of abstention from the commission of a crime or tort or grossly immoral conduct or from the breach of an official or statutory duty. It is clearly against the interest of the community to allow an action in these cases, notwithstanding the formal contract that is completed by the promise and the consideration.

[2] Reynolds *v.* Nugent, 25 Ind. 328, 329, 330; Harrison *v.* Cassady, 107 Ind. 158, 168; Schuler *v.* Myton, 48 Kan. 282, 288; Vanderbilt *v.* Schreyer, 91 N. Y. 392, 401; Seybolt *v.* New York Co., 95 N. Y. 562, 575. See also Jones *v.* Waite, 5 Bing. N. C. 341, 351, 356, 358–359. To these cases may be added Ecker *v.* McAllister, 45 Md. 290, 54 Md. 362. In this case the court in deciding, in opposition to the majority of the modern authorities, that forbearance to prosecute a *bona fide* but groundless claim against A was not a consideration for a promise by B, said extrajudicially that a promise of such forbearance would not support a counter-promise by B.

[3] 9 C. B. N. S. 159.

[4] 6 H. & N. 295.

fendant was charged upon a unilateral contract, the plaintiff would without doubt, have been equally successful had the contract been bilateral. The plaintiff did succeed upon similar bilateral contracts in Abbot *v.* Doane[1] and Green *v.* Kelley.[2]

The only judicial intimation of a distinction, in point of consideration, between the performance and a promise to perform a contractual duty to a third person is this statement by James, J., in Merrick *v.* Giddings.[3] "A promise made in consideration of the doing of an act which the promisee is already under obligation to the third party to do . . . is not binding, because it is not supported by a valuable consideration. On the other hand, if a promise be made in consideration of a *promise* to do that act . . . then the promise is binding, because not made in consideration of the performance of an existing obligation to another person, but upon a new consideration moving between the promisor and promisee." This *dictum* was confessedly inspired by the following passage from Pollock on Contracts:[4] "But there seems to be no solid reason why the promise should not be good in itself, and therefore a good consideration. It creates a new and distinct right, which must always be of some value in law, and may be of appreciable value in fact. There are many ways in which B may be very much interested in A's performing his contract with C, but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. It may be well worth his while to give something for being enabled to insist in his own right on the thing being done." The court seems not to have been aware that the same distinction had been taken by Professor Langdell in his summary of the law of Contracts:[5] "It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding, though the promise on one side be merely to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not therefore be a sufficient consideration. The reason of this distinction is that a person does not, in legal contemplation, incur any detriment by doing a

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[1] 163 Mass. 433. [2] 64 Vt. 309.

[3] 1 Mack. 394, 410, 411.

[4] (1st ed.) 158. It is to be regretted that the learned author came afterwards to doubt the soundness of this statement. Contracts (4th ed.), 179; 3 Eng. Encycl. of Law, 341.

[5] Sect. 84.

thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.*, one to each of two persons) though each be to do the same thing."

Sir William Anson, on the other hand, rejects this distinction as involving the vice of reasoning in a circle: "If we say that the consideration is the detriment to the promisee exposing himself to two suits instead of one for the breach of contract, we beg the question, for we assume that an action would lie on such a promise."[1] The learned author seems not to have appreciated the far-reaching effect of this criticism. For, as Professor Williston has pointed out, it applies with equal force to all cases of mutual promises.[2] Professor Williston, however, concurs with Anson's criticism of the theory advanced by Pollock and Professor Langdell, but, in order to prevent its application to bilateral contracts generally, proposes to "revise slightly the test of consideration in a bilateral contract, seeking the detriment necessary to support a counter-promise in the thing promised, and not in the thing itself." Against this view that a promise will be a consideration when, and only when, that which is promised would be so regarded, two objections may be urged. First, the test proposed is artificial; secondly, to assume the validity of the promises covered by this test is precisely the same begging of the question that Professor Langdell's critics have found so objectionable in the case of the promise to A to perform one's contract with B. One who follows these critics must therefore put all valid bilateral contracts into the category of inexplicable anomalies.

But is there, in truth, any foundation for the criticism of Professor Langdell's doctrine that mutual promises between A and B are binding, although A promises to do what he was already bound to do by a contract with C? Is not the alleged question-begging in this case, and indeed in all cases of mutual promises, purely imaginary? To answer these questions we must ascertain just what is the consideration in the case of bilateral contracts. Everyone will concede that the consideration for every promise must be some act or forbearance given in exchange for the promise. The act of each promisee in the case of mutual promises is obviously

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[1] Anson, Contracts (8th ed., p. 92; 1st ed., p. 80).

[2] 8 Harv. Law. Rev. 35.

the giving of his own promise *animo contrahendi* in exchange for the similar promise of the other. And this is all that either party gives to the other. This, then, must be the consideration for each promise ; and it is ample on either of the two theories of consideration under discussion. For the giving of the promise is not only an act, but an act that neither was under any obligation to give. This simple analysis of the transaction of mutual promises is free from arbitrary assumptions and from all reasoning in a circle. The supposed difficulty in this class of cases springs from the assumption that the consideration in a bilateral contract is the legal obligation, as distinguished from the promise, of each party. But this is to overlook the difference between the act of a party and the legal result of the act. The party does the act, the law imposes the obligation. Suppose, for example, that X promises to pay A a certain amount of money in consideration of A's signing, sealing, and delivering, *animo contrahendi*, a writing containing a promise by A to convey a certain tract of land to X, and that A does sign, seal, and deliver the written promise accordingly. X is unquestionably bound by this acceptance of his offer. A, however, has done nothing beyond the performance of certain formal acts. These acts alone must form the consideration of X's promise. Indeed X by the express terms of his offer stipulated for precisely that consideration. He was willing to do so, of course, because the performance of those acts would bring A within the rule of law which imposes an obligation upon any one who executes a sealed promise. Precisely the same reasoning applies in the case of mutual promises. Each party is content to have the promise of the other given *animo contrahendi*, because each is thereby brought within the rule of law which imposes an obligation upon any one who has received what he bargained for in return for his promise.

The form of declaration upon a bilateral contract is significant. The count never alleges any obligation on the part of the plaintiff, but states simply, in accordance with the facts, that, in consideration that the plaintiff promised to do a certain thing, the defendant promised to do a certain other thing. The courts too from the earliest times of mutual promises have designated the promise as the consideration of the counter-promise.[1]

[1] Wichals *v.* Johns (1599), Cro. El. 703. "A promise against a promise is a good consideration;" Bettisworth *v.* Campion (1608), Yelv. 134: "The consideration on each part was the mutual promise of the one to the other." See also Strangborough *v.* Warner (1588), 4 Leon. 3; Gower *v.* Capper (1597), Cro. El. 543.

The fact that it is the promise and not the legal obligation of each party that forms the consideration for the promise of the other, explains certain classes of cases in which one party is under a legal liability from the outset, although no action will ever be maintainable against the other. If, for example, A is induced to enter into a bilateral contract with B by the fraud of the latter, the contract cannot be enforced against A, but A may enforce it against B. This is shown by several cases of engagement to marry between a man already married and a woman who believed him to be single.[1] The consideration is ample on both sides, but public policy forbids an action in favor of the deceiver, but cannot be urged against a recovery by the innocent party.[2] The same result would follow in the case of a bilateral contract procured by duress practised by one of the parties upon the other. Again, if only one of the parties to a bilateral contract within the Statute of Frauds has signed a memorandum, he may be charged upon the contract, although he cannot charge the other party.[3] He must suffer, not because either promise lacks consideration, but for his fault in not obtaining a memorandum of the contract signed by his adversary. Similarly an adult is bound by his promise, although he has no remedy on the counter-promise of an infant, it being thought expedient to give the latter this protection against his own improvidence.[4] Whether a bilateral contract is enforceable by either of the parties if one was insane when the promises were given is not definitely settled.[5] It would seem reasonable to charge the sane promisor if he were aware of his co-promisor's insanity, but not otherwise. The same distinction should obtain, in the absence of legislation enabling a married woman to contract, in the case of mutual promises between a married woman and another. But there is no recognition of this distinction in the decisions; nor, on the other hand, has any deci-

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[1] Wild *v.* Harris, 7 C. B. 999; Millward *v.* Littlewood, 5 Ex. 775; Kelley *v.* Riley, 106 Mass. 339; Blattmacher *v.* Saal, 29 Barb. 22; Cammerer *v.* Muller, 14 N. Y. Sup. 511, affirmed without opinion in 133 N. Y. 623, Stevenson *v.* Pettis, 12 Phila. 468; Coover *v.* Davenport, 1 Heisk. 363; Pollock *v.* Sullivan, 53 Vt. 507.

[2] If the woman knew that her fiancé was already married, neither can maintain an action against the other. Noce *v.* Brown, 39 N. J. 133; Haviland *v.* Halsted, 34 N. Y. 643.

[3] Laythoarp *v.* Bryant, 2 Bing. N. C. 735; Justice *v.* Lang, 42 N. Y. 493, and cases cited in Browne, Statute of Frauds (5th ed.), 495, n. 1.

[4] Holt *v.* Ward, 2 Stra. 937; Bruce *v.* Warwick, 6 Taunt. 118; Cannon *v.* Alsbury, 1 A. K. Marsh. 76; Atwell *v.* Jenkins, 163 Mass. 362 (*semble*); Moynahan *v.* Agricultural Co., 53 Mich. 238; Hunt *v.* Peake, 5 Cow. 475.

[5] See Atwell *v.* Jenkins, 163 Mass. 362, 364.

sion been found at variance with it.[1] A married woman's freedom to contract is now so generally sanctioned by statute that the validity of the distinction here suggested is not likely to be brought to the test of judicial decision. But if, before the modern legislation, a man had said to a married woman: "I know your promise is not legally binding; nevertheless if you will promise, with the intention of keeping your word, to use your influence with your husband in favor of sending your son to college, I will promise to pay his tuition fees;" and the woman promised accordingly, is there any reason why the man should not be bound by his promise? Mutual promises between a corporation acting *ultra vires* and another give no right of action to either party. Public policy demands this result. As Lord Campbell, C. J., said: "It would indeed be strange if a corporation entering into a commercial contract might enforce it at pleasure, but might break it with impunity whenever fraudulently induced to do so."[2]

That the consideration in bilateral contracts is the promise and not the legal obligation of each party is most convincingly proved by the cases in which, from the very nature of the transaction, and as both parties clearly understand, mutual obligations are impossible. In a wager, for example, upon an issue already irrevocably determined, but the determination of which is unknown to the parties, one of them is liable to an action at the very moment of the wager, while the other is not then nor ever will be bound to do anything.[3] Suppose, again, a difference to arise between the parties to a sale as to the number of acres in a tract of land sold as containing five hundred acres, and the seller to promise to pay $20 for every acre less than five hundred in return for the buyer's promise to pay $20 for every acre in excess of five hundred. Here, too, one of the parties is free and the other bound the moment the promises are exchanged. Judgment was given for the plaintiff in

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1 In several cases bills by married women for specific performance have been dismissed in accordance with the familiar principle that specific performance will not be decreed unless the remedy is mutual. Warren *v.* Costello, 109 Mo. 338; Lanier *v.* Ross, 1 Dev. & B. Eq. 39; Tarr *v.* Scott, 4 Brewst. (Pa.), 49; Williams *v.* Graves, 7 Tex. Civ. Ap. 356; Shenandoah Co. *v.* Dunlop, 86 Va. 346. In Shaver *v.* Bear River Co., 10 Cal. 396, the counter-promise was *ultra vires*.

2 Copper Miners *v.* Fox, 16 Q. B. 229, 237.

3 "There was a wager laid between A and B concerning the quantity of yards of velvet in a cloak, and each of them agreed that if there were ten yards of velvet in the cloak that then they should be delivered to B, and if not to A. This is good and may be pursued accordingly." Shep. Act. (2d ed.), p. 178.

such a case.[1] If the consideration of the enforceable promise must be found, if at all, in a legal obligation of the party giving the counter-promise, it would be impossible to support the decision in this and similar cases. But the decisions are clearly right if the mere promise of the winner is the consideration for the promise of the loser. That this was the intention of the parties can hardly be questioned. Each one gives his promise in exchange for a counter-promise which he knows may prove worthless to him. But because of his ignorance of the true state of the case each is content to take the promise of the other for better or worse, and the loser is justly bound by his bargain because he has received in exchange for his promise the very thing that he asked for.

The question whether a promise to perform a pre-existing contractual duty to a third person may be a consideration for a counter-promise has been discussed thus far as a matter of principle. As already stated, although there are some adverse *dicta*, there is no decision adjudging such a consideration to be invalid. But these *dicta* are more than offset by an important class of decisions, which cannot be sustained except upon the theory that such a consideration is valid. These decisions illustrate one form of the familiar doctrine of novation. C, for instance, conveys property to A, who promises therefore to pay C's debt to B. Subsequently A and B enter into a bilateral contract, A promising to B to pay C's debt to him, and B promising A never to sue C upon the debt. B's promise operates as an equitable release of C, and A becomes bound to B in C's place. And yet A has promised B only what he was already bound to do by his prior contract with C. No one can doubt that the validity of this form of novation is firmly established in our law.[2] But more than this, any theory of consideration which would nullify this rational business arrangement stands *ipso facto* condemned, unless inexorable logic compels its recognition. But, if the reasoning in the preceding pages is sound, the logic is all in favor of the novation.

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[1] Seward *v.* Mitchell, 1 Coldw. 87; Williston, Cases, on Contracts, s. c. 554. See to the same effect, March *v.* Pigott, 5 Burr. 2802; Barnum *v.* Barnum, 8 Conn. 469; Howe *v.* O'Malley, 1 Murph. 287; Supreme Assembly *v.* Campbell, 17 R. I. 402. Professor Langdell considers these cases erroneous in principle, and regards them as illustrations of the rule "Communis error facit jus." Summary, sect. 69.

[2] Bird *v.* Gannon, 3 Bing. N. C. 883; *Re* Times Co., 5 Ch. 381; *Re* Medical Co., 6 Ch. 362; Rolfe *v.* Flower, L. R. 1 P. C. 27; McLarin *v.* Hutchinson, 22 Cal. 187; Bowen *v.* Kurtz, 37 Iowa, 239; Langdon *v.* Hughes, 107 Mass. 272; Scott *v.* Hallock, 16 Wash. 439.

No other decisions upon the point under discussion have been found. But imaginary cases may be put. C, wishing to assist his friend B, makes a bilateral contract with A, A promising to discount all bills offered by B between January and July, 1898, up to the limit of $10,000, and C promising to indemnify A. Subsequently B obtains a similar promise from A to himself in return for a promise on his own part. A afterwards declines to discount bills when offered, claiming that the mutual promises between himself and B are not binding because his own promise was to do what he was already bound to do by his contract with C.[1]

Again, a father wishing his son to live in a house near his own, promises the son to furnish the house in return for the son's promise to buy it of X, the owner. Subsequently the son and X enter into a mutual written agreement for the purchase of the house. The father then learns that a more desirable house may be obtained at the same price, and agrees to furnish that instead of the other. The son accordingly notifies X that he will not take X's house, and when reminded of his contract answers, "Oh, our agreement was no contract. I had already promised to my father to buy the house, so my promise to you to buy it was no consideration for your promise, and both promises are worthless." Would any court exonerate the son?

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[1] By varying slightly the facts of this supposed case and applying the theory of those who dissent from Shadwell *v.* Shadwell and Scotson *v.* Pegg, namely, that the performance of an existing contract with a third person cannot be a consideration for a promise, we obtain a somewhat startling result. Suppose C, instead of asking for A's promise, merely to offer to indemnify A as to all bills that he may discount for B in a given period up to a given limit. Then, as before, A and B make their bilateral arrangement to discount and reimburse. A thereupon discounts bills when offered, but B becomes insolvent. A then seeks to charge C upon his promise to indemnify. C, however, disclaims liability, because A in discounting the bills was simply performing his contract with B. Suppose still another case. C being interested in the welfare of two young men, A and B, promises each of them $500 in consideration of their abstaining from the use of intoxicating liquor during the year 1897. To strengthen their resolution to earn the reward, A and B enter into a bilateral contract not to use intoxicating liquor during 1897. They keep this contract, but on applying to C for the promised reward are told that he has changed his mind and that they have no legal claim against him, since they have simply performed their pre-existing contractual duty to each other. Furthermore, those who disapprove of Shadwell *v.* Shadwell must, to be consistent, dissent from Gurin *v.* Cromartie, 11 Ired. 174 (see also Greenling *v.* Bawdit, Sty. 404, and Culliar *v.* Jermin, Sty. (463), in which case C was charged upon a promise in consideration of marriage by a promisee who had no fiancée at the time of C's offer to him. One may well hesitate to acquiesce in a doctrine of consideration that would exonerate C in these three cases. Such a result would be grotesque were it not also unjust.

II. Promises of Performance of a Pre-existing Contractual Duty to Counter-promisor.

If the parties to a contract see fit for any reason satisfactory to themselves to make a bilateral agreement whereby one of the parties promises to perform his previous contract, it is difficult to see any objection to this genuine bargain on the score of consideration. The new promise is an act, and rendered by one who was entirely free to withhold it. The authorities were formerly in harmony with this logical conclusion.

In 1602, in Goring *v.* Goring,[1] which was a case of mutual promises by the creditor's executor to accept and by the debtor to pay 150 pounds in annual instalments in satisfaction of 205 pounds, the debtor was charged upon the new promise, the court saying: "The consideration alleged is sufficient for another reason; . . . for the plaintiff agreeing to take 150 pounds for 205 pounds is a promise on his part, and so one promise against another." Ten years later another creditor succeeded against his debtor upon the new bilateral agreement, Flemming, C. J., remarking: "This is a very plain and clear case: here the promise is mutual; the plaintiff promised to stay and surcease his suit, and the defendant promised to pay 100 pounds."[2]

The first case in which a new bilateral agreement between a creditor and debtor was judged invalid was Lynn *v.* Bruce.[3] There were mutual promises, as in Goring *v.* Goring,[1] by the creditor to accept and by the debtor to pay 73 pounds in satisfaction of a debt of 105 pounds. The debtor paying only 70 pounds, the creditor brought an action for the other 3 pounds. The plaintiff was unsuccessful; not, however, because the debtor's promise to pay a part of his debt was not a consideration, but strangely enough, because in the opinion of the court the plaintiff's promise was not a consideration. Goring *v.* Goring[1] was not cited, and the court considered themselves bound by the numerous cases in which an accord unexecuted had been held to be no bar to an action upon the original debt. "It was argued," say the court, "according to the cases in Rol. Abr., that an accord executory in

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1 Yelv. 11.

2 Pooley *v.* Gilberd, 2 Bulst. 41. See to the same effect, Woolaston *v.* Webb (1611), Hob. 18; Flight *v.* Gresh (1625), Hutt. 77, 78; Cowlin *v.* Cook (1626), Noy 83, Latch 151, Poph. 183. See further, Thomas *v.* Way (Massachusetts, 1898). 52 N. E. R. 525., *per.* HOLMES, J.

3 2 H. Bl. 317.

any part is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument to say that no remedy lies for it for the plaintiff, because it is no bar."

Truly a singular perversion.[1] The explanation just given of Lynn *v.* Bruce is confirmed by the equally remarkable decision in Reeves *v.* Hearne.[2] A creditor agreed to accept and the debtor agreed to give a suit of clothes in satisfaction of the debt. It seems impossible to detect any flaw in this bilaterial contract, and yet the creditor was not permitted to recover upon a breach of the promise to deliver the clothes. The court simply followed Lynn *v.* Bruce. Because the creditor could, notwithstanding the new agreement, sue upon his old claim, he should not be permitted to have an action on the new promise. Reeves *v.* Hearne and the reasoning in Lynn *v.* Bruce, if not the case itself, are effectually discredited by later decisions.[3]

Professor Langdell supports Lynn *v.* Bruce on the ground that a debtor's promise to his creditor to pay his debts is not a consideration.[4] But he cites no other authority for this view. The same view is expressed by Leake[5] and Pollock,[6] but without reference

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[1] The value of this reasoning will be better appreciated by comparing an accord with an award. Originally, if parties submitted a controversy to arbitration, an award that one party pay a definite amount of money to the other created a debt recoverable by action and also barred the original claim. An accord, — that is, mutual promises, — on the other hand, was neither a cause of action nor a bar to an action before the days of Assumpsit. Fitz. Ab. f. 15, pl. 5; Y. B. 5 Ed. IV. 7–13; Y. B. 16 Ed. IV. 8–5; Y. B. 17 Ed. IV. 8–6; Y. B. 6 Hen. VII. 11–8; Andrews *v.* Boughey, Dy. 75, a, 75, b; Onely *v.* Kent, Dy. 355, b, 356, a. Even an award to do something other than the payment of money had no more legal effect than an accord; for debt was, in early times, the only remedy upon an award. Y. B. 16 Ed. IV. 8–5; 2 Harv. Law Rev. 62. But after Assumpsit came in and implied promises in fact were recognized, any award barred the original claim, since the successful party could sue upon the other's breach of his promise to abide by the award. 2 Harv. Law Rev. 62. The attempt to make an accord also a bar to the original claim by reason of the new remedy of Assumpsit upon the promise failed, as it ought to fail. Allen *v.* Harris, 1 Ld. Ray. 122; James *v.* David, 5 T. R. 141; Bayley *v.* Homan, 3 Bing. N. C. 915; Gabriel *v.* Dresser, 15 C. B. 622. In the case of the award it was not the promises but the subsequent award that constituted the bar. So in the accord it is the subsequent performance that corresponds to the award. If, however, the parties explicitly agree that the new promise, as distinguished from its performance, shall of itself be a satisfaction of the original claim, it will so operate. Hale *v.* Flockton, 14 Q. B. 380, 16 Q. B. 1039 (*semble*); Johnassohn *v.* Ransome, 3 C. B. N. S. 779 (*semble*); Kromer *v.* Hill, 75 N. Y. 574.

[2] 1 M. & W. 323.

[3] Crowther *v.* Farrer, 15 Q. B. 677; Nash *v.* Armstrong, 10 C. B. N. S. 259.

[4] Summary, sect. 89.

[5] Cont. (2d ed.) 619.

[6] Cont. (6th ed.) 176.

to Lynn *v.* Bruce, and is supported by *obiter dicta* of the judges in the few cases that they cite.[1] Professor Williston[2] and Professor Harriman[3] also entertain a similar opinion. One who dissents from such an array of expert opinion cannot fail to recognize the vehemence of the presumption against his own view. But in the present instance it may be fairly urged in point of authority that these writers seem not to have considered the early decisions adverse to their doctrine, that there is not a vestige of authority in its support prior to 1828, and that there is no English decision in its favor since that date.[4]

The reason for this modern doctrine is thus expressed by Pollock: "It is obvious that an express promise by A to B to do something which B can already call on him to do can in contemplation of law produce no fresh advantage to B or detriment to A."[5] To this it may be answered that the law does not pretend to measure the adequacy of a consideration, if there is any consideration. Certainly the making of the new promise by A is an act, and one which he was under no obligation to give. If B thought it sufficiently for his interest to give a counter promise in exchange for A's promise, and the mutual agreement is open to no objection on grounds of policy, why should not the court give

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1 Bayley *v.* Homan, 3 Bing. N. C. 915, 921; Jackson *v.* Cobbin, 8 M. & W. 790; Mallalieu *v.* Hodgson, 16 Q. B. 689; Frazer *v.* Hatton, 2 C. B. N. S. 512, 524. To these may be added Philpot *v.* Briant, 4 Bing. 717, 721; Lyth *v.* Ault, 7 Ex. 669, 674.

2 8 Harv. Law Rev. 27.

3 Cont. 65.

4 The doctrine has, however, prevailed in a few of our States. Ford *v.* Garner, 15 Ind. 298; Eblin *v.* Miller, 78 Ky. 371. See also the following note.

5 Cont. (6th ed.) 176. The American cases in the preceding note proceed upon this same principle. The principle was singularly misapplied by several courts to mutual promises by a creditor to forbear to sue until a fixed day upon a claim already due, and by the debtor to pay at that day legal interest in addition to the principal. Abel *v.* Alexander, 45 Ind. 523; Hume *v.* Mazelin, 84 Ind. 574; Holmes *v.* Boyd, 90 Ind. 332; Wilson *v.* Power, 130 Mass. 127 (*semble*); Hale *v.* Forbes, 3 Mont. 395; Grover *v.* Hoppock, 2 Dutch. 191; Kellogg *v.* Olmsted, 25 N. Y. 189. Parmelee *v.* Thompson, 45 N. Y. 58; Olmstead *v.* Latimer (N. Y. 1899), 33 N. E. R. 5; Sticker *v.* Giles, 9 Wash. 147 (*semble*). The right to an assured income for a definite period is surely a fresh advantage to the creditor, and the duty to pay it is a fresh detriment to the debtor. Accordingly, such a bilateral agreement is generally upheld in this country. Stallings *v.* Johnson, 27 Ga. 564; Crossman *v.* Wohlleben, 90 Ill. 537, 541; Royal *v.* Lindsay, 15 Kan. 591; Shepherd *v.* Thompson, 2 Bush, 176; Alley *v.* Hopkins, 98 Ky. 668; Chute *v.* Parke, 37 Me. 102; Simpson *v.* Evans, 44 Minn. 419; Moore *v.* Redding, 69 Miss. 841; Fowler *v.* Brooks, 13 N. H. 240; McComb *v.* Kittridge, 14 Oh. 348; Fawcett *v.* Freshwater, 31 Ohio St. 637; Benson *v.* Phipps, 87 Tex. 578.

effect to this bargain as fully as to any other? Furthermore, if the court is to assume the function of measuring the value of an act given in exchange for a promise, we shall have a new crop of fine-spun distinctions. One of these distinctions is illustrated by Lyth *v.* Ault.[1] One of two joint debtors promised to pay the debt in return for the creditor's promise never to sue his co-debtor. The agreement was held valid, because the separate promise of the one might be of more value than the joint promise of the two.[2] If the sole promise to pay the entire claim is more valuable than the original joint liability the sole promise to pay 99 per cent of the claim might also be more valuable. If this is true of a promise of 99 per cent, why not also of a promise of 90 per cent or 50 per cent or of 1 per cent? Where is it possible to draw the line? Obviously this distinction between a new promise by the two joint-debtors and a new promise by one of them is highly technical. But the distinction leads to one result worse than technical. Wherever the doctrine of Foakes *v.* Beer obtains, payment of the whole or a part of the joint debt by one of the debtors is not a valid consideration for a promise of the creditor.[3] And yet by Lyth *v.* Ault a sole promise of such payment is a valid consideration. The bird in the hand is worth less than the bird in the bush! Truly it is a novel standard of value that the courts would give us in overriding the bargain of the parties.[4]

The technical character of the modern attempt to determine the value of a promise may be shown in another way. It has often been decided that a promise by a debtor to pay his debt at a future day in consideration of actual forbearance by the creditor in the meantime is binding.[5] A similar promise by the debtor in consid-

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[1] 7 Ex. 669.

[2] A similar agreement was upheld in Morris *v.* Van Vorst, 1 Zab. 100, 119; Luddington *v.* Bell, 77 N. Y. 138; Allison *v.* Abendroth, 108 N. Y. 138; Jaffray *v.* Davis, 124 N. Y. 164, 173 (*semble*). But see *contra* Early *v.* Burt, 68 Iowa, 716.

[3] Deering *v.* Moore, 86 Me. 181; Weber *v.* Couch, 134 Mass. 26; Line *v.* Nelson, 38 N. J. 358; Harrison *v.* Wilcox, 2 Johns. 448; Martin *v.* Frantz, 127 Pa. 389.

[4] In Bendix *v.* Ayers, 21 N. Y. Ap. Div. 570, the court decided that the part payment of a joint debt by one of the debtors was a valid consideration, because the promise of partial payment of one of the debtors, which was confessedly valid, "is certainly not as advantageous to the creditor as the acceptance of the actual money." The good sense of the argument is indisputable, but the doctrine of Foakes *v.* Beer is still law in New York.

[5] Smith *v* Hitchcock, 1 Leon 252; Tenancy *v.* Brown, Cro. El. 272; May *v.* Alvares, Cro. El. 387; Baker *v.* Jacob, 1 Bulst. 41; Pete *v.* Tongue. 1 Roll. R. 404; King *v.* Weeden, Sty. 264; Boone *v.* Eyre, 2 W. Bl. 1312; Hopkins *v.* Logan, 5 M. & W. 241.

eration of the creditor's covenant to forbear must be equally valid. Shall a similar promise in consideration of the creditor's simple promise to forbear be invalid?

Again, as appears from Morton *v.* Burn,[1] the assignee of a chose in action may make a valid bilateral contract with the debtor, the assignee promising to forbear for a time to sue the debtor in the name of the creditor (or to-day in his own name) in return for the debtor's promise to him to pay the debt. Shall such mutual promises between the assignee, the *dominus* of the claim, and the debtor be valid, but similar promises between a creditor and the debtor when the debt is not assigned be invalid?

Since a right of action in Assumpsit may be more advantageous than an action of Covenant either because the specialty may be lost, or the creditor might wish to join his action with other counts in Assumpsit, or for some other reason, shall a promise by a specialty debtor to pay his debt be a consideration for a promise by the creditor, and a similar promise by a simple contract creditor be no consideration?

Since a promise in writing is more readily proved than an oral promise, shall the new bilateral written agreement by the creditor to forbear and the debtor to pay be valid if the original debt were oral, but not valid if it were in writing?

Even if this test of value is to be applied, must not every promise of payment made by a simple contract debtor after the debt is due be a consideration? For the new promise is in one respect more valuable than the old liability, since it will survive after the old claim is barred by the Statute of Limitations.[2]

On the other hand, this same test of value is irreconcilable with two classes of decisions which are not likely to be overruled. First, those allowing an action upon a wager on a past event or upon the kindred mutual promises already considered?[3] For at the moment of the bargain one of the promises, as both parties know, must be worthless. Secondly, the cases, already discussed,[4] in which one of the parties to a bilateral contract wrongfully refusing to go on, it is mutually agreed to rescind the contract and to substitute a new one in its place, whereby the dissatisfied party agrees to perform his original undertaking in return for the other's

[1] 7 A. & E. 19.

[2] Stallings *v.* Johnson, 27 Ga. 564. See also Hopkins *v.* Logan, 5 M. & W. 241.

[3] *Supra*, page 34, note 3, and page 35, note 1.

[4] 12 Harv. Law Rev. 528, n. 2.

promise of larger compensation. In neither of these classes of cases can there be a consideration, except upon the principle that any act by a promisee in exchange for a promise is a consideration.

It is clear that this innovation of the nineteenth century, by which the courts assume to determine the value of an act irrespective of the value set upon it by the parties, is not a success. It breaks up reasonable bargains, and cumbers the law with unreasonable distinctions. It is not yet too late to abandon this modern invention and to return to the simple doctrine of the fathers, who found a consideration in the mere fact of a bargain, in other words, in any act of forbearance given in exchange for a promise. This rule gives the formality needed as a safeguard against thoughtless gratuitous promises, meets the requirements of business men, and frees the law of consideration from subtleties that serve no useful purpose.

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